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IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

ELIZABETH ANDERSON HISHON,

Petitioner,

—v.—

KING & SPALDING,

Respondent.

ON CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF OF THE AMERICAN CIVIL LIBERTIES UNION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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INTEREST OF AMICUS CURIAE*

The American Civil Liberties Union (ACLU) is a nationwide, nonpartisan organization of over 250,000 members which is dedicated to protecting the fundamental rights of the people of the United States, including the right to equal treatment under the law. One of the major civil liberties issues still facing the United States is the elimination of all vestiges of racism and sexism, and the wholly justified demand of women and minorities for access to opportunities from which they have so long been excluded.

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* The parties have consented to the filing of this brief, and their letters of consent are being filed with the Clerk of Court pursuant to Rule 36.2 of the Rules of this Court.

In numerous cases before this Court, the ACLU has challenged discrimination against minorities and women under the Fifth and Fourteenth Amendments, and has also urged the full enforcement of Title VII of the Civil Rights Act of 1964 to remedy the causes and effects of such prohibited and invidious discrimination.

The ACLU has been in the forefront in the defense of First Amendment Rights, including the right to freedom of association which amicus believes is incorrectly asserted by the respondent in this case.

STATEMENT OF THE CASE

Amicus adopts the Statement of the Case in the Brief of Petitioner.

STATEMENT OF ISSUE PRESENTED FOR REVIEW

The only issue necessarily before this Court is whether the decision of a large, institutionalized law firm to decline to promote one of its associates to partnership on the basis of the employee's race, sex, religion or national origin and, by force of the firm's no "permanent associate" policy, to discharge such employee falls within the purview of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e, et seq. (hereinafter "Title VII" or "Act"). In the view of amicus and in accord with the only lower court decision on point, Lucido v. Cravath, Swaine & Moore, 425 F. Supp. 123 (S.D.N.Y. 1977), such a decision would constitute both discrimination with respect to that associate's "terms, conditions, or privileges of employment" within the meaning of Section 703(a)(1) and the deprivation of a significant

"employment opportunit[y]" within the meaning of Section 703(a)(2) of the Act. §§ 703(a)(1)(2), codified at 42 U.S.C. § 2000e-2(a)(1)&(2).[1] This case does not necessarily present the related questions of whether partners are themselves "employees" under the Act; whether the relations inter se among partners are subject to the antidiscrimination strictures of the Act; or whether a decision to hire partners from outside the firm falls within the Act's coverage.

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1. 42 U.S.C. § 2000e-2(a)(1)&(2) provide:

> (a) It shall be an unlawful employment practice for an employer -
>
> (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or
>
> (2) to limit, segregate, or classify his employees or applicants for employment in any way which would

(footnote continued on following page)

SUMMARY OF ARGUMENT

1. Whether or not partners are "employees" under Title VII or the relations inter se among partners are subject to its strictures, proper construction of Title VII requires the conclusion that a large, institutionalized law firm's discriminatory refusal to promote an associate to partnership constitutes discrimination with respect to "terms, conditions, or privileges of employment" and discriminatory denial of "employment opportunities" within the meaning of Section 703(a) of the Act, 42 U.S.C. 2000e-2(a)(1)&(2). The language, structure, legislative history and judicial construction of the Act make clear that Congress intended a broad,

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(footnote continued from preceding page)
deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

comprehensive antidiscrimination principle applicable to virtually every sector of employment in our country and to every level of employment within the operations of employers having fifteen or more employees. The inclusive sweep of the statute,with exemptions from coverage few in number and narrow in scope, cannot be squared with judicial recognition of implied exclusions from coverage. The history of the 1972 amendments, including Congress' rejection of a bill to exempt hospitals with respect to the selection of physicians and surgeons, further confirms the comprehensive scope of the Title VII antidiscrimination principle.

For many young lawyers emerging from law school, employment with a large private firm is the only viable career plan. The opportunity to be selected for partnership is the principal "employment con-

dition" or "employment opportunity" such firms offer. To insist on nondiscrimination at the entry level while withholding Title VII scrutiny with respect to partnership promotion decisions is to deny protection when it is most needed, when careers hang in the balance. Courts have insisted on Title VII oversight in the analogous context of the tenure decisions by colleges and universities. Congress has insisted on Title VII oversight in the analogous context of selecting senior physicians and surgeons to staff the nation's hospitals. No basis whatever exists to exclude the legal profession from the nation's commitment to eradicate discrimination from the workplace.

None of the reasons advanced below by respondent for excluding the partnership promotion decision from Title VII scrutiny withstands analysis. Decisional law makes clear that promotion, even if

coupled with a proprietary interest, remains a covered employment condition or employment opportunity. Moreover, even if partners are not themselves "employees" under Title VII, the decision whether or not to promote a conceded employee to an arguably exempt position remains within the purview of the Act. Finally, the unanimous consent requirement of state law and the partners' liability for partnership obligations offer no basis for a total exclusion from coverage.

2. In view of the broad reach of Title VII, Congress' explicit provision for legitimate claims of associational privacy, and the absence of any serious constitutional objection, there is no basis in this case for resorting to extraordinary techniques of statutory construction, including the so-called "clear statement" rule. The essential predicates for the "clear statement" technique, a

statute capable of two or more "fairly possible" constructions, a failure on Congress' part to consider the constitutional question, and the presence of a "serious doubt of constitutionality", are wholly absent in this case. Indeed, when measured against this Court's associational privacy decisions, including the claim rejected in Runyon v. McCrary, 427 U.S. 160 (1976), the claim of a large law firm to be exempt from the law's command that it not discriminate on grounds demeaning to individual dignity borders on the frivolous.

3. In any event, the Court should reverse the judgment below and remand for further discovery as to whether newly selected or junior partners occupy a status in fact more closely resembling an employee than a co-owner. In light of the truncated discovery below and the dearth of systematic knowledge as to the

actual workings of law firms, the Court of Appeals was plainly wrong in affirming the dismissal of the complaint when it had no basis for knowing what role junior partners in fact play in profit participation and governance at respondent law firm.

ARGUMENT

I. PROPER CONSTRUCTION OF TITLE VII REQUIRES THE CONCLUSION THAT A LARGE, INSTITUTIONALIZED LAW FIRM'S DISCRIMINATORY REFUSAL TO PROMOTE AN ASSOCIATE TO PARTNERSHIP CONSTITUTES DISCRIMINATION WITH RESPECT TO "TERMS, CONDITIONS, OR PRIVILEGES OF EMPLOYMENT" AND DISCRIMINATORY DENIAL OF "EMPLOYMENT OPPORTUNITIES" WITHIN THE MEANING OF SECTION 703(a)

The language, structure, legislative history and judicial construction of Title VII make plain the conclusion that Congress intended broad, comprehensive application of the antidiscrimination principle to all sectors of employment in our country. Only last term, in Sumitomo Shoji America,

Inc. v. Avigliano, 102 S.Ct. 2374, (1982), this Court unanimously rejected the claim of an American subsidiary of a Japanese company that a treaty privileged it to hire only male Japanese citizens to fill executive, managerial and sales positions. In this case, where no argument based on treaty or foreign policy considerations is possible, the Court should reject respondent's attempt to carve out an implied exclusion from the Act's sweep. Under prior rulings of this Court and the lower courts, even if partners of a law firm are not themselves "employees" under Title VII, the promotion of associates who are concededly employees to such arguably exempt positions may not be denied on grounds proscribed by the Act. A contrary interpretation of the Act confers an immunity on businesses operating in the partnership form to withhold

important employment opportunities from conceded employees on the basis of race, color, religion, sex or national origin -- ironically, in this context, a license for law firms to operate outside of the law.

A. The Language, Structure and Legislative History of Title VII Make Evident the Broad, Comprehensive Sweep of Congress' Determination to Eradicate Discrimination in All Employment Settings, and Preclude Judicial Recognition of Implied Exclusions from Coverage.

Title VII establishes a comprehensive antidiscrimination principle to virtually every sector of employment in our country and to every level of employment within the operations of employers having fifteen or more employees. Congress took care in Section 701(a) to include within the meaning of covered "person" (and thereby covered "employer"), "partnerships" and "legal representatives"

as well as "governments, governmental agencies, political subdivisions, labor unions, ... associations, corporations, ... mutual companies, joint-stock companies, trusts, unincorporated organizations, trustees, trustees in [bankruptcy] cases under Title II, or receivers." 42 U.S.C. § 2000e(a). Exemptions from statutory coverage are few in number and narrow in scope. Under Section 701(f), the term "employee" is broadly defined to reach any "individual employed by an employer," with only a narrow exemption for persons elected to public office in state and local government and their appointees with policymaking responsibility and top-level advisers. 42 U.S.C. §2000e(f).

The reach of Title VII's antidiscrimination principle emerges most clearly when a comparison is drawn with the other major federal statute governing

employment relations, the Labor-Management Relations Act (or Taft-Hartley Act) of 1947, as amended, 29 U.S.C. §151, et seq. (hereinafter "Taft-Hartley Act"). Unlike the Taft-Hartley Act, Title VII lacks an exclusion for supervisory employees or managerial and top-level policymaking personnel. NLRB v. Bell Aerospace Co., 416 U.S. 267 (1974). Title VII extends to supervisory, managerial and policy-making employees because Congress determined that discrimination on the basis of race, color, religion, sex, or national origin should not block access to such positions, and no legitimate prerogative of the employer is sacrificed by adherence to the non-discrimination principle.

The 1972 amendments to Title VII further confirm the comprehensive reach of the Act. Congress, in 1972, narrowed the exclusion for small firms from twenty-five to fifteen employees, 42 U.S.C.

§ 2000e(b). The exclusion for employees of state and local governments was eliminated. Pub. L. No. 92-261, § 2(2), 86 Stat. 103 (codified as amended at 42 U.S.C. § 2000e(b)). In addition, Congress deleted the exemption for employees of educational institutions, noting the importance of removing barriers to the advancement of black and female scholars on college and university faculties. See H.R. Rep. No. 238, 92nd Cong., 1st Sess. 19 (1971). Even more revealing is Congress' rejection of a proposed amendment, introduced by Senator Ervin, to exempt public and private hospitals with respect to the selection of physicians and surgeons. Senator Williams, a principal manager of the 1972 amendments, responded in debate:

> We have seen, during the debate on [this bill] S.2515, that minorities and women have been, and continue to be, denied access to high-level

> and professional job categories. The medical profession, I regret, offers no exception to this pattern of discrimination.

118 Cong. Rec. 3800 (1972)(remarks of Sen. Williams). Senator Williams then yielded to Senator Javits, another floor leader, who urged rejection in the strongest of terms:

> One of the things that those discriminated against have resented the most is that they are relegated to the position of the sawers of wood and the drawers of water; that only the blue collar jobs and ditchdigging jobs are reserved for them; and that though they built America, and certainly helped build it enormously in the days of its basic construction, they cannot ascend the higher rungs in professional and other life .... Yet this amendment would go back beyond decades of struggle and of injustice, and reinstate the possibility of discrimination on grounds of ethnic origin, color, sex, religion -- just confined to physicians or surgeons, one of the highest rungs of the ladder that any member of a minority could attain -- and thus lock in and

> fortify the idea that being a doctor or a surgeon is just too good for members of a minority, and they have to be subject to discrimination in respect of it, and the Federal law will not protect them.
>
> This would be most iniquitous. I simply cannot believe that in this year it would be seriously entertained as a possibility by way of exemption from this bill.
>
> I hope very much, almost in self-respect, that the Senate will decisively reject this amendment.

118 Cong. Rec. 3802 (1972)(remarks of Sen. Javits).

As Senator Javits noted, assuring access to "the highest rungs of the ladder" is critical to an effective assault on discrimination in the work-place. For this Court to affirm the judgment of the Court of Appeals below would be to risk the denial of equal access to "the highest rungs of the ladder" in the legal profession for years to come, merely because the legal

profession is generally organized in partnership form.[2]

Only last term in Sumitomo Shoji America, Inc. v. Avagliano, 102 S.Ct. 2374 (1982), this Court unanimously rejected the argument of a locally incorporated, wholly-owned subsidiary of a Japanese corporation that treaty and foreign policy considerations mandated an implied immunity from Title VII scrutiny with respect to its decision in filling executive, managerial and sales positions.

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2. A recent survey of major law firms revealed that although modest progress has occurred in the hiring of associates, of 4,271 partners in 1981, women accounted for 2.8 percent, blacks for 0.5 percent, and Hispanics for 0.3 percent. Burke & Johnson, More Women on the Way Up, 3 Nat'l Law J. 1, 10 (April 20, 1981). The history of discriminatory exclusion in the legal profession is usefully recounted in C.F. Epstein, Women in Law (1981); C.P. Clark, Minority Opportunities for Blacks, Puerto Ricans and Chicanos (1974); J. Auerbach, Unequal Justice (1976). For the problems faced by a young lawyer seeking employment with respondent King & Spalding, see M. Abrams, The Day Is Short 62, 95 (1982).

Respondent's argument in this case for an implied exclusion stands on far weaker ground. There is simply no basis for finding in this statute implied exclusions from coverage.

B. In the Context of Employment in a Large Law Firm, the Opportunity to "Make Partner" Is the Quintessential Condition of Employment or Employment Opportunity.

In an era in which "hanging a shingle" is rarely a viable option, employment with a law firm leading to partnership is a principal career pattern available to young legal professionals. The opportunity to be "made a partner" after a period of apprenticeship is the principal employment condition or employment opportunity law firms can offer. Law firms are well aware of this when they interview at law schools and often adjust their policies on lateral hiring and salary, see

Nelson, Practice and Privilege: Social Change and the Structure of Large Law Firms, 1981 Am. Bar Fndn. Res. J. 97, 126, to reflect the likelihood of being able to award partnership at the end of the apprenticeship. No one joins a major law firm with the expectation of remaining an associate, and normatively the profession does not regard permanent associate status as an appropriate final status.

Excluding the partnership promotion decision from the purview of the Act is tantamount to depriving the employed professional lawyer of protection against discrimination when it is most needed, when careers hang in the balance. It would be tantamount to saying in the higher education context that there shall be no discrimination in hiring academics, but all bets are off when the tenure decision is made. Though mindful

of the evidentiary difficulties of applying Title VII to higher-level professional jobs, the courts have declined to immunize the tenure decisions of university faculties and administrations from Title VII scrutiny.[3] They have properly declined to hold out the promise of nondiscriminatory employment opportunity at the entry level while withholding Title VII review of tenure promotion decisions. The same course is required in the context of employment in the legal profession.

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3. See generally, Yurko, Judicial Recognition of Academic Collective Interests: A New Approach to Faculty Title VII Litigation, 60 B.U.L.Rev. 473 (1980); Waintroob, The Developing Law of Equal Employment Opportunity at the White Collar and Professional Level, 21 Wm. & Mary L. Rev. 45 (1979); Note, Title VII on Campus: Judicial Review of University Decisions, 82 Colum. L. Rev. 1206 (1982); Note, Tenure and Partnership as Title VII Remedies, 94 Harv. L. Rev. 457 (1980).

C. Respondent Offers No Basis for a Statutory Construction Excluding the Partnership Promotion Decision from Title VII Scrutiny.

The Court of Appeals below was fatally in error in stating that petitioner could not prevail because it "cannot find the requisite congressional intent to permit Title VII's intervention into matters of voluntary association." Pet. for Writ of Cert., App. A, at A-6. In view of the comprehensive scope of Title VII, offering no ground for judicial recognition of implied exclusions from coverage, and the obvious centrality of the partnership promotion decision to the employed professional lawyer, it is respondent's burden to offer this Court a proper basis for excluding that decision from Title VII scrutiny.

From what can be gleaned from respondent's assertions below, the argument appears to be that the partnership promotion decision is different from other

employment opportunities in that (1) it is often coupled with a proprietary interest in the firm, (2) the individual promoted to partner no longer remains an employee, (3) state law often requires the unanimous consent of all partners before a new one can be made, and (4) partners are personally liable for the actions of their co-partners. None of these grounds provides support for respondent's position.[4]

1. Proprietary Interest

There is no reason logically why a promotion decision loses its character as an employment condition or employment opportunity within the meaning of Title VII simply because the promotion is coupled with a proprietary interest in the firm. As this Court stated in Goldberg

4. Any claim based on the associational privacy interests of large, institutionalized law firms will be treated in Point II, infra.

v. Whitaker House Coop., 366 U.S. 28, 32 (1961), "[t]here is nothing inherently inconsistent between the coexistence of a proprietary and an employment relationship." Thus, most recently in Bonilla v. Oakland Scavenger Co., 697 F.2d 1297 (1982), the Ninth Circuit invalidated a firm's shareholder preference plan that assigned the better jobs to shareholder-employees, who were exclusively of Italian ancestry and were either members of the family or close friends of current shareholders. Judge Farris' analysis is particularly pertinent here:

> The Company argues that Title VII has no application to discrimination in the sale of corporate stock. Even if this is so, however, it does not help the Company's position here. Since the Company ties preferential wages, hours, and job assignments to ownership of its stock, the shareholder preference plan constitutes a condition of employment subject to the mandate of Title VII. The Company's organiztion closely entangles stock ownership and employment privilege, but the predominant characteristics are

those of employment.

Id. at 1302. Employment characteristics predominated because shareholder-employees agreed to serve as full-time employees and stock ownership was not freely transferable.[5]

2. Promotion to an Exempt Position

Even if one assumes arguendo that under no circumstances can a partner be an "employee" for Title VII purposes (a highly doubtful assumption), it nonetheless remains clear that while the individual remains a statutory employee, promotion, even to a position exempt from

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5. See Pettway v. American Cast Iron Pipe Company, 494 F.2d 211, 264-66 (5th Cir. 1974), where the court held that the opportunity to serve on the Board of Operatives and to influence management by voting employee shares held by the Board was so connected to employment that black employees could not be excluded.

statutory coverage, may not be denied on grounds that violate the laws governing the treatment of employees. In Golden State Bottling Co. v. NLRB, 414 U.S. 168, 187-89 (1973), this Court unanimously sustained the agency's backpay order for a period subsequent to the time the discriminatee would have become an independent contractor exempt from coverage under the Taft-Hartley Act. The Court, id. at 188, relied on the Second Circuit's opinion in NLRB v. Bell Aircraft Corp., 206 F.2d 235, 237 (1953), in which Judge Chase stated:

> But, even if we assume, arguendo, that an applicant for a supervisory position who was not already an employee of this particular employer would not have been a protected employee under the Act, it does not follow that Finch was similarly not protected. At the time the discrimination took place, he was clearly a protected employee, and his prospects for promotion were among the conditions of employment. The Act protected him so long as he held a nonsupervisory position, and it is immaterial that the protection thereby afforded was calculated

> to enable him to obtain a position in which he would no longer be protected.

See Oil, Chemical & Atomic Workers v. NLRB, 547 F.2d 575, 579 (D.C. Cir. 1976), cert. denied, 431 U.S. 966 (1977).

Respondent contended below that protecting the promotion decision under Title VII without imposing full Title VII strictures on all aspects of the relationship between partners inter se would constitute a futile exercise of judicial authority, since an employer bent on discrimination might promote an associate to partnership and promptly dismiss the newly-minted partner. However, where a post-promotion act of discrimination against a partner is a pretext to avoid the command of Title VII, courts possess ample authority to look through such a shabby ploy and enforce the Act.

3. Unanimous Consent Requirement

There is no conflict between the command of Title VII and any state-law requirement that admission to partnership requires the unanimous consent of all existing partners. See Lucido v. Cravath, Swaine & Moore, 425 F. Supp. at 129. Title VII merely forbids reliance on certain discriminatory criteria in withholding consent. In any event, if there is any inconsistency, Title VII clearly enjoys preemptive force. 42 U.S.C. § 2000e-7.

4. Responsibility for Partnership Obligations

Although it is true that partners are personally liable for all partnership obligations, and every partner is an agent of the partnership for the purpose of its business,[6] it is not clear

6. Some acts are not within the apparent
(footnote continued on following page)

why this provides a basis for a blanket exemption from Title VII. At most, it argues that the partnership selection process must be carefully undertaken, and that reviewing courts should decide Title VII challenges to partnership denials with a sensitivity for legitimate, non-discriminatory performance criteria. The fact that difficult evidentiary issues will arise in the context of Title VII challenges involving high level positions is not a justification for abdicating responsbility in an area. See Bartholet, Application of Title VII to Jobs in High Places, 95 Harv. L. Rev. 945 (1982).

(footnote continued from preceding page) authority of a partner or are deemed unauthorized under the Uniform Partnership Act. See J.A. Crane & A.R. Bromberg, Crane and Bromberg on Partnership §§ 51-52 (1968). In addition, the partnership agreement can restrict the authority of particular partners and such restrictions are effective between partners and binding on third parties having notice thereof. See id. § 53.

II. IN VIEW OF THE BROAD REACH OF TITLE VII, CONGRESS' EXPLICIT PROVISION FOR CLAIMS OF ASSOCIATIONAL PRIVACY, AND THE WEAKNESS OF ANY CONCEIVABLE CONSTITUTIONAL OBJECTION ASSERTABLE BY RESPONDENT, THERE IS NO BASIS IN THIS CASE FOR RESORTING TO EXTRA-ORDINARY TECHNIQUES OF STATUTORY CONSTRUCTION, INCLUDING THE "CLEAR STATEMENT" RULE.

Respondent is ultimately driven to make a constitutional argument of sorts, but it is not a frontal challenge to the constitutionality of Title VII as applied to a law firm of the size and influence of King & Spalding. Rather, respondent argues that Title VII should be given other than its natural meaning in the service of a constitutional right of undefined origin and scope to choose one's business partners free of government regulation. However, the breadth of Title VII, Congress' explicit consideration of legitimate associational privacy interests, and the absence of any serious constitutional issue preclude resort to

extraordinary techniques of statutory interpretation, including the so-called "clear statement" rule.

A. The Essential Predicates for the "Clear Statement" Rule are (1) a Statute Capable of Two or More "Fairly Possible" Constructions, (2) A Failure on Congress' Part to Consider the Constitutional Claim, and (3) the Presence of "a Serious Doubt of Constitutionality".

As this Court stated in Crowell v. Benson, 285 U.S. 22, 62 (1932), and reaffirmed in International Association of Machinists v. Street, 367 U.S. 740, 749-50 (1961):

> When the validity of an act of the Congress is drawn in question, and even if a serious doubt of constitutionality is raised, it is a cardinal principle that this Court will first ascertain whether a construction of the statute is fairly possible by which the question may be avoided.

The theory behind the "clear statement" rule is that where a statute poses

a "serious doubt of constitutionality" and "fairly" admits of an alternative reading not raising the question, the Court should opt for the latter interpretation in the interest of avoiding unnecessary constitutional adjudication and of assuring that Congress consciously focused on the constitutional issue in advance of constitutional adjudication.[7] Where a "serious doubt" of constitutionality is absent, there is no basis for bypassing the usual rules for reading statutes. Even where such a question is present, where the statute does not "fairly" admit of an alternative reading, the Court enjoys

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7. See A. Bickel, The Least Dangerous Branch 165-66 (1962); Estreicher, Judicial Nullification: Guido Calabresi's Uncommon Common Law for a Statutory Age, 57 N.Y.U.L. Rev. 1126, 1150-53 (1982); Neuborne, Separation of Powers and Judicial Review in France and the United States, 57 N.Y.U.L. Rev. 363, 419-421 (1982).

no warrant to render a forced, distorted reading. And even if these predicates are met, if Congress has in fact focused on the constitutional question in passing the earlier measure, there is no justification for repeating the dialogue.

B. Title VII's Comprehensive Scope and Congress' Consideration of Associational Privacy Interests Preclude Resort to "Clear Statement" Techniques.

Much has already been said in Point I,A, about Title VII's broad, comprehensive antidiscrimination sweep. When proper weight is given to language, structure, and legislative history, this is not a statute which permits of repair carpentry in the form of judicially implied exclusions. Moreover, since Congress has already focused on and made provision for what it found to be legitimate associational privacy in-

terests, this Court must accept such definitive declaration of congressional intention. In excluding from coverage small firms -- reduced from twenty-five employees to fifteen employees in 1972 -- Congress sought not only to meet Commerce Clause authority objections but also to advance privacy concerns. As Senator Humphrey, one of the principal managers of the proposed legislation, stated on the floor of the Senate, when firms have more than twenty-five employees, "[t]hey also lose most of whatever intimate, personal character they might have had." 110 Cong. Rec. 13088 (1964)(remarks of Sen. Humphrey). In other provisions as well, the exemptions for religious organizations and for bona fide private membership clubs, Congress made clear that Title VII was enacted with full appreciation of po-

tential associational privacy claims.[8]

C. Any Constitutional Objection to Extending Title VII to the Partnership Promotion Decisions of Large, Institutionalized Law Firms Borders on the Frivolous.

To appreciate the weakness of respondent's constitutional claim, the precise scope of the issue before this Court bears repeating. This case does not necessarily present questions of whether partners are themselves "employees" within the purview of Title VII; whether the relations inter se among partners are governed by Title VII; or whether the decision to hire partners from outside the firm is sub-

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8. Intimacy and privacy concerns also inform the exemptions in Title II and Title VIII of the 1964 Civil Rights Act. See generally Note, Federal Power to Regulate Private Discrimination: The Revival of the Enforcement Clauses of the Reconstruction Era Amendments, 74 Colum. L. Rev. 449, 491 and nn. 255, 256 (1974).

ject to Title VII strictures. Moreover, in the context of a facial challenge to Title VII coverage, no issue is raised as to whether the statute may constitutionally be applied to a law firm organized to propagate an ideology at variance with Title VII or to a firm peculiarly vulnerable to official harassment. Cf. Brown v. Socialist Workers '74 Campaign Committee, 51 U.S.L.W. 4015 (U.S. Dec. 8, 1982). In short, any constitutional doubt here must relate to the application of Title VII to partnership promotion decisions of a large, institutionalized law firm servicing clients across the country.[9]

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9. Respondent conceded below that "it derives a substantial portion of its total fees from clients who reside or have their principal place of business outside the State of Georgia and...that, in performing legal services for these clients and for its clients within the (footnote continued on following page)

This Court has never extended affirmative constitutional protection to the discriminatory preferences of major actors in the commercial and professional life of our country; indeed, only a single concurring opinion in 1964 suggests the possibility of doing so.[10] As stated in Norwood v. Harrison, 413 U.S. 455, 469-70 (1973):

> "although the Constitution does not proscribe private bias, it places no value on discrimination as it does on the values inherent in the

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(footnote continued from preceding page) State of Georgia, lawyers who are members of or are employed by this defendant make numerous trips to points outside of Georgia." Joint Appendix (hereafter "J.A.") 141. Its argument "that it is not a person engaged in an industry affecting commerce is based upon the fact that the provision of legal services is a 'profession,' not an 'industry.'" Id. at 246. But see Goldfarb v. Virginia State Bar, 421 U.S. 773, 785-88 (1975).

10. See Bell v. Maryland, 378 U.S. 226, 313 (1964) (Goldberg, J., concurring).

> Free Exercise Clause. Invidious private discrimination...has never been accorded affirmative constitutional protections."

Rejecting the claim of a labor union, also a private, unincorporated membership association, to be free of a state law proscription of racial discrimination, Justice Frankfurter signaled his agreement with the majority, noting that while a state may tolerate private discrimination, "[t]o use the Fourteenth Amendment as a sword against...State power [prohibiting discrimination] would stultify that Amendment." Railway Mail Association v. Corsi, 326 U.S. 88, 98 (1945) (Frankfurter, J. concurring); see id. at 93-94 (majority opinion). Reluctant, as Justice Frankfurter was, to dignify a claim devoid of constitutional substance," id. at 98, we nonethless offer some additional elaboration.

Presumably any constitutional claim of a right to discriminate in partnership promotion would be founded on the right of association held to be implicit in the First Amendment and a more general right of privacy derived from the broad command of the Due Process Clause of the Fourteenth Amendment. As Professor Tribe has noted, there is a "dual character" to such claims of associational right:

> But rights to associate with X are necessarily rights to dissociate from Y....[T]he right of one person or group to exclude others is inevitably a limitation upon the freedom -- including the associational freedom -- of those others.

L. Tribe, American Constitutional Law §§15-18, at 974 (1978). A claim of associational right, where it is not tied to independent First Amendment concerns, is, in essence, a claim of autonomy, to be free of the regulatory

reach of the law. Religious groups, relying on the affirmative sanction of the Free Exercise Clause, will on occasion successfully press such claims. Even in that context, however, "[w]hen followers of a particular sect enter into commercial activity as a matter of choice, the limits they accept on their own conduct as a matter of conscience and faith are not to be superimposed on the statutory schemes which are binding on others in that activity." United States v. Lee, 455 U.S. 252, 261 (1982) (sustaining the imposition of social security taxes on an Amish carpenter employing other Amish). It is a claim that courts may honor with respect to affairs of the heart or soul in the sanctity of the home or other intensely private settings. Cf. Griswold v. Connecticut, 381 U.S. 479, 485-86 (1965). It is not a claim, however,

that readily permits extension to the business and employment decisions of entities operating in the commercial world.[11]

Perhaps the case closest on point, and indeed one presenting a much stronger claim of associational privacy than does respondent, is Runyon v. McCrary, 427 U.S. 160 (1976). The case involved a private school's claim to be free of the antidiscrimination principle of a Reconstruction-era civil rights statute, 42 U.S.C. §1981. Rejecting the claim of a right to discriminate based on freedom of association, the Court made clear that no First Amendment privilege to espouse particular views was infringed by insistence on nondiscrimina-

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11. See generally Note, Federal Power to Regulate Private Discrimination, supra, 74 Colum. L. Rev. 449, 520-24 (1974).

tory access to the school:

> From this principle it may be assumed that parents have a First Amendment right to send their children to educational institutions that promote the belief that racial segregation is desirable, and that the children have an equal right to attend such institutions. But it does not follow that the practice of excluding racial minorities from such institutions is also protected by the same principle.

427 U.S. at 176 (emphasis in original). Turning to the right of privacy claim, the Court noted that prohibiting "a private school's adherence to a racially discriminatory admissions policy...does not represent governmental intrusion into the privacy of the home or a similarly intimate setting," and that parents "have no constitutional right to provide their children with private school education unfettered by reasonable government regulation." Id. at 178.

If parents in Runyon v. McCrary were unable to articulate a persuasive

associational claim to be free from a Congressional prohibition on racial discrimination, surely the partners in a large and influential law firm cannot advance a serious claim to such an exemption.

III. IN THE ALTERNATIVE, THE COURT SHOULD REVERSE THE JUDGMENT BELOW AND REMAND FOR FURTHER DISCOVERY AS TO WHETHER NEWLY SELECTED OR JUNIOR PARTNERS OCCUPY A STATUS IN FACT MORE CLOSELY RESEMBLING THAT OF EMPLOYEE THAN CO-OWNER.

Even if the Court rejects our submission that the strength of the legislative history and weakness of respondent's constitutional argument require outright reversal, the judgment of the Court of Appeals should still be reversed, and the case be remanded for further discovery and trial as to actual participation of newly selected or junior partners in the profits and governance of respondent law firm. In view

of the truncated discovery below and the paucity of systematic knowledge about the actual workings of major law firms, no one can say with confidence what role junior partners in fact play in profit participation and governance in major firms. It may be the case, whether formally or as a matter of practice, that junior partners are more "income partners" than "equity partners." Since this may well bear on the question of whether promotion to such positions comes within the ambit of Title VII, the Court of Appeals was plainly wrong in broadly ruling that "Title VII does not apply to those decisions dealing with the formation of partnerships," Pet. for Writ of Cert., App. A, at A-14, and in affirming dismissal of the complaint.

CONCLUSION

For all of the foregoing reasons, amicus submits that the judgment of the Court of Appeals should be reversed.

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